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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 598

SOUTHERN CALIFORNIA GAS COMPANY, a corporation,

Petitioner,

vs.

CITY OF LOS ANGELES, a municipal corporation,

Respondent.

Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of California.

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TOPICAL INDEX

PAGE

I.

No federal question is properly raised 1

II.

Question presented 3

III.

The "Statement of the Case" set forth in the petition is misleading in its mixture of law and facts 4

IV.

No reason exists for the issuance of the writ requested herein 6

Conclusion 8

TABLE OF AUTHORITIES CITED

CASES — PAGE

California v. Marin Municipal Water District, 17 Cal. 2d 699, 111 P. 2d 651 5

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 17 S. Ct. 581, 41 L. Ed. 979 7

Chicago, B. & Q. R. Co. v. Illinois ex rel. Grimwood, 200 U. S. 561, 26 S. Ct. 341, 50 L. Ed. 596 7

Grass Valley v. Walkinshaw, 34 Cal. 2d 595, 212 P. 2d 894 4

Herndon v. State of Georgia, 295 U. S. 441, 55 S. Ct. 794, 79 L. Ed. 1530 3

Louisville Gas & Electric Co. v. Commissioners of Sewerage of Louisville, 33 S. W. 2d 344 8

McCoy v. Shaw, 277 U. S. 302, 48 S. Ct. 519, 72 L. Ed. 891 3

Mobile, etc. R. Co. v. Mississippi, 210 U. S. 187, 28 S. Ct. 650, 52 L. Ed. 1016 3

National Water Works Co. of New York v. City of Kansas, 28 Fed. 921 8

New Orleans Gaslight Co. v. Drainage Comm. of New Orleans, 197 U. S. 453, 25 S. Ct. 471, 49 L. Ed. 831 6

New Orleans Public Service Inc. v. City of New Orleans, 281 U. S. 682, 50 S. Ct. 449, 74 L. Ed. 1115 8

People's Gas, Light and Coke Co. v. City of Chicago, 109 N. E. 2d 777 8

Radio Station WOW v. Johnson, 326 U. S. 120, 65 S. Ct. 1475, 87 L. Ed. 2092 2

Transit Commission v. Long Island Railroad Co., et. al., 253 N. Y. 345, 171 N. E. 565 8

United States Fidelity & Guaranty Co. v. State of Oklahoma, 250 U. S. 111, 39 S. Ct. 399, 63 L. Ed. 876 2

Western Gas Co. of Washington v. City of Bremerton, 153 P. 2d 846 8

RULES

	PAGE
Rules of the United States Supreme Court, Rule 19	3

STATUTES

California Public Utilities Code, Sec. 10101 et seq	5
United States Code, Title 28, Sec. 1257(2)	2
United States Code, Title 28, Sec. 1257(3)	2, 3
United States Constitution, Fourteenth Amendment	2, 6

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Southern California Gas Company has petitioned for a writ of certiorari directed to the Supreme Court of the State of California to review the decision of that court in the above entitled matter. It is submitted that, for the reasons hereinafter set forth, the petition should be denied.

I.

No Federal Question Is Properly Raised.

Petitioner states at page 2 of its petition that

> "The jurisdiction of this Court is invoked under 28 U. S. C. 1257(2) since the rights, privileges and immunities of the Petitioner since the inception of the case have been and are now claimed under the guaranties and protections of the Constitution of the United States."

Petitioner's claim of jurisdiction must be based on 28 U. S. C. 1257 (*3*), not 28 U. S. C. 1257 (*2*) as it recites. Its so-called "claim" of protection under the United States Constitution is apparently based on (1) its allegation in Paragraph III of its second cause of action in its amended complaint that the "taking, damaging and appropriation" of its property without compensation therefor was without due process of law and thereby violated the Fourteenth Amendment to the Constitution of the United States, and (2) the claim upon the very last page of its Petition for Rehearing before the California Supreme Court that "the action of the City in requiring such relocation is a taking or damaging of the Company's rights granted to it by the franchise" and thereby entitled the company to compensation under the provisions of the Fourteenth Amendment to the United States Constitution.

The case was tried upon an agreed statement of facts. The trial court simply adopted such agreed statement as its findings of facts and concluded as a matter of law that plaintiff (petitioner herein) was entitled to a money judgment against the City in the sum stated therein. No finding was ever requested of or made by the trial court upon the relatively hidden and unhurged federal question mentioned in the amended complaint. Under such circumstances we submit that question should not be considered a *substantial* federal question and is not entitled to a review by this Honorable Court. (*U. S. Fidelity & Guaranty Co. v. State of Oklahoma*, 250 U. S. 111, 39 S. Ct. 399, 63 L. Ed. 876.) Further, the raising of a federal question at the time of seeking a rehearing before the State Supreme Court does not suffice to open such question to review in the United States Supreme Court. (*Radio Station WOW v. Johnson*, 326 U. S. 120, 65 S. Ct. 1475, 87 L. Ed. 2092; *Herndon v. State*

of Georgia, 295 U. S. 441, 55 S. Ct. 794, 79 L. Ed. 1530.)

In any event, the basis of the determination by the California Supreme Court, to wit: that the required relocation by a utility of its facilities in a public street to make way for a governmental use thereof is not a "taking" of those facilities or of the franchise or of any rights secured thereunder, is in accord with literally hundreds of cases throughout the United States, some of the strongest of which were decided by this very court (see Paragraph IV below). We neither have knowledge of nor has petitioner cited us to a single case to the contrary of the foregoing principle and thus, we submit, there is not presented to this court a matter heretofore undetermined by it as required by Rule 19 of the Rules of this Honorable Court.

The further determination of the California Supreme Court that a municipality exercises the state police power in laying its sewers within streets outside the municipal boundaries and in doing so may require the relocation of interfering utility lines therein is one solely of state concern and as such is not subject to review by this Court. (28 U. S. C. 1257(3); *McCoy v. Shaw,* 277 U. S. 302, 48 S. Ct. 519, 72 L. Ed. 891; *Mobile, etc., R. Co: v. Mississippi,* 210 U. S. 187, 28 S. Ct. 650, 52 L. Ed. 1016.)

II.

Question Presented.

Petitioner sets forth at page 2 of its petition the "Question Presented" as being whether public utility property is protected by the due process clause from forced "removal" without compensation to make way for "other underground facilities" to be installed by a "public agency" outside its own jurisdiction.

It should be noted from the Agreed Statement of Facts and from the decision of the California Supreme Court that the foregoing statement of the question presented is far beyond the issues of the instant case. The question presented and determined in the instant case is simply whether a public utility must *relocate* at its own expense its lines underlying public streets in unincorporated area to make way for a *sewer* being installed therein by a *municipality*. We wish to emphasize that the instant case involves (1) *relocation* of utility facilities, not removal thereof, (2) to make way for a *sewer*, a governmental function, not some proprietary function, and (3) at the behest of a California *municipality* having in general plenary powers (*Grass Valley v. Walkinshaw*, 34 Cal. 2d 595, 212 P. 2d 894), not some public agency of perhaps enumerated or limited powers only.

III.

The "Statement of the Case" Set Forth in the Petition Is Misleading in Its Mixture of Law and Facts.

The facts of this case are neatly and succinctly set forth in the opening paragraph of the opinion of the California Supreme Court (page 5, Appendix "B" of the Petition for Writ of Certiorari herein).

Petitioner's "Statement of the Case" is primarily an argument on the law and apparently misconstrues respondent's contentions and the express holding of the California Supreme Court. For example, petitioner first sets forth at page 3 of its petition that "Respondent City obtained its right to install a sewer in the same streets (as the petitioner) from he same County Board on December 1, 1953," and further that "The City had no power to install sewers in county streets except thusly by the grant from the County," citing California Public

Utilities Code, Section 10101, *et seq.* Quite contrary to the above, the California Supreme Court expressly stated, "Such obligations (upon the utility to relocate its facilities in county streets to make way for governmental improvements being installed by a municipality) rest on the paramount right of the people as a whole to use the public streets wherever located, and the fact that a franchise is granted by one political subdivision as an agent of the state (citations) does not defeat the right of another such agent acting in its governmental capacity to invoke the public right for the public benefit (citations). The fact that the city's use of county streets for its sewers is authorized by section 10101 of the Public Utilities Code has no bearing on the applicability of the foregoing rule. . . . In the present case . . . the city is exercising one of its most important governmental powers, a power so important that it is one of the few powers it may exercise outside of its territorial limits without express authorization (citations)." (Petition, Appendix "B", pages 7 and 8.)

Later in this "Statement of the Case" at page 3 of the petition, petitioner states that "By virtue of this grant by the County Board, the City then became possessed of a franchise similar and equal to that of petitioner, according to established State law. *California v. Marin Municipal Water District*, 17 Cal. 2d 699, 111 P. 2d 651 (1942)." The California Supreme Court, on the other hand, expressly pointed out that the *Marin* case involved a municipal water district operating in a *proprietary* capacity, and concluded that ". . . it does not follow that a franchise exercised by a city in its governmental capacity under that section (Public Utilities Code, section 10101) is subordinate to a prior franchise granted to a public utility." (Petition, Appendix "B", page 8.)

Petitioner has similarly misstated the facts when it claims at page 4 of the petition that it "has asserted a taking of its property without due process and just compensation in violation of the Fourteenth Amendment in every court below." As pointed out above, petitioner's only reference to the Fourteenth Amendment in this entire case has been a passing reference thereto in its amended complaint (upon which no finding was made) and another reference upon the last page of its Petition for Rehearing before the California Supreme Court. Furthermore, no mention whatsoever of this point was made by petitioner in the District Court of Appeal.

IV.

No Reason Exists for the Issuance of the Writ Requested Herein.

Petitioner states at page 2 of its petition that "The constitutional provision involved is the due process clause of the Fourteenth Amendment."

It is submitted that the law is clear and firmly established that a utility's property has not been "taken" within the meaning of that word as used in the Fourteenth Amendment when the relocation thereof within public streets is required to make way for a governmental improvement. The following cases are clearly illustrative of such principle.

In *New Orleans Gaslight Co. v. Drainage Commission of New Orleans,* 197 U. S. 453, 25 S. Ct. 471, 49 L. Ed. 831, the leading case on the subject, it was determined by this Court that the plaintiff company, which held an exclusive franchise to lay its gas lines in the public streets, must relocate same at its own expense so as to make way for a municipal drainage system, although no

such obligation was spelled out or even suggested within its franchise. In support of such determination it was there stated, at page 462:

> "The gas company, by its grant from the city, acquired no exclusive right to the location of its pipes in the streets, as chosen by it, under a general grant of authority to use the streets. The city made no contract that the gas company should not be disturbed in the location chosen. In the exercise of the police power of the state, for a purpose highly necessary in the promotion of the public health, it has become necessary to change the location of the pipes of the gas company so as to accommodate them to the new public work. In complying with this requirement at its own expense, none of the property of the gas company has been taken, and the injury sustained is *damnum absque injuria*."

In *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 17 S. Ct. 581, 41 L. Ed. 979, this Court likewise held at page 252 that property damaged or injured by a relocation thereof to make way for a public use

> ". . . is not, within the meaning of the Constitution, taken for public use, nor is the owner deprived of it without due process of law."

In *Chicago, B. & Q. R. Co. v. Illinois ex rel. Grimwood*, 200 U. S. 561, 26 S. Ct. 341, 50 L. Ed. 596, it was again held that the plaintiff must assume the cost of relocation of its facilities to make way for the public improvement of an underlying water channel. In that case this Court stated at page 584, after referring to several cases involving varied subject matters, not limited to drainage cases, that:

> ". . . in each of those cases this court recognized the principle that injury may often come to private

property as the result of legitimate governmental action, reasonably taken for the public good and for no other purpose, and yet there will be no *taking* of such property within the meaning of the constitutional guaranty against the deprivation of property without due process of law, or against the taking of private property for public use without compensation. To this case belongs the recent, and as we think, decisive case of *New Orleans Gaslight Co. v. Drainage Commission, . . .*"

Similar language is found in the cases of *People's Gas. Light and Coke Co. v. City of Chicago* (Ill., 1952), 109 N. E. 2d 777; *Louisville Gas & Electric Co. v. Commissioners of Sewerage of Louisville* (Ky., 1931), 33 S. W. 2d 344; *New Orleans Public Service Inc. v. City of New Orleans* (La., 1930), 281 U. S. 682, 50 S. Ct. 449, 74 L. Ed. 1115; *Western Gas Co. of Washington v. City of Bremerton* (Wash., 1944), 153 P. 2d 846; *Transit Commission v. Long Island Railroad Co., et al.*, 253 N. Y. 345, 171 N. E. 565, 566; *National Water Works Co. of New York v. City of Kansas*, 28 Fed. 921.

Conclusion.

It is submitted that for the reasons above set forth the petition for writ of certiorari should be denied.

Respectfully submitted,

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